



David Kaiser - NOAA Federal <david.kaiser@noaa.gov>

Re: FW: Blue Water Fisheries, LLC Finfish Aquaculture Farm

1 message

David Kaiser - NOAA Federal <david.kaiser@noaa.gov>

Fri, Feb 26, 2021 at 1:46 PM

To: "Scott W. Flood" <scott@bwfisheries.com>

Cc: "Williams, Chris" <CHRISTIAN.P.WILLIAMS@des.nh.gov>, "Couture, Steve" <STEVEN.M.COUTURE@des.nh.gov>, "Diers, Ted" <THEODORE.E.DIERS@des.nh.gov>, Kerry Kehoe <kerry.kehoe@noaa.gov>, "Boeri, Robert (EEA)" <Robert.Boeri@massmail.state.ma.us>, "Todd Burrowes (todd.burrowes@maine.gov)" <todd.burrowes@maine.gov>, Betsy Nicholson <betsy.nicholson@noaa.gov>, Adam Dilts - NOAA Federal <adam.dilts@noaa.gov>, Jackie Roller <jackie.rolleri@noaa.gov>, Joelle Gore <joelle.gore@noaa.gov>, Laura Petes - NOAA Federal <laura.petes@noaa.gov>, Kevin Madley - NOAA Federal <kevin.madley@noaa.gov>, Christopher Schillaci - NOAA Federal <christopher.schillaci@noaa.gov>, "Kristoff, Richard C Jr CIV USARMY CENAD (US)" <richard.c.kristoff@usace.army.mil>, "Gaito, Danielle" <gaito.danielle@epa.gov>, "Nelson, Eric" <nelson.ericp@epa.gov>, Jeff Payne - NOAA Federal <jeff.payne@noaa.gov>, Mel Cote <cote.mel@epa.gov>, Regina Lyons <lyons.regina@epa.gov>

Dear Mr. Flood,

Thank you for your February 21, 2021, email and letter regarding the Blue Water Fisheries, LLC (BWF) proposed finfish aquaculture project in federal waters off Maine, New Hampshire, and Massachusetts, and BWF's application to the U.S. Army Corps of Engineers (USACE) (USACE file number, NAE-2020-00155). In your email you ask that the National Oceanic and Atmospheric Administration's (NOAA's) Office for Coastal Management "reconsider, and reverse," its opinion, stated in a February 12, 2021, email from David Kaiser, that the 30-day time period for a state to submit an unlisted activity review (UAR) request to the Office for Coastal Management under 15 CFR § 930.54 of the Coastal Zone Management Act (CZMA) regulations has not yet started. You also ask the Office for Coastal Management to advise BWF what appeal process is available should the Office for Coastal Management not reverse its opinion.

The Office for Coastal Management and NOAA Office of General Counsel, Oceans and Coasts Section, have reviewed your request and we are still of the opinion that there is not an active application before the USACE and that the 30-day UAR request time period has not started.

NOAA's regulations at 15 CFR § 930.51(f) begin with the statement that "[t]his subpart applies to active applications" (italics in original). The "subpart" refers to 15 CFR part 930, subpart D, which includes regulations at 15 CFR §§ 930.50 through 930.66. Therefore, this language regarding "active applications" applies to state UAR requests submitted pursuant to 15 CFR § 930.54. NOAA's opinion that the 30-day time period for a state to submit an UAR request has not yet started for BWF's application to the USACE is not a departure from past NOAA interpretation of the regulations, nor is it a new policy.

Once the states receive notice that the USACE has determined it has sufficient information from BWF to continue processing the application, and the notice to the states "contain[s] sufficient information for the State agency to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable," then those states would have 30 days to submit an UAR request to the Office for Coastal Management. See 15 CFR §§ 930.51(f) and 930.54(2).

If BWF does not meet the USACE's time period to provide the additional information requested by the USACE and the USACE administratively closes BWF's file, then the CZMA consistency process would be terminated. Under this scenario, if BWF were to reapply to USACE, a new federal consistency review process would start. See 15 CFR § 930.51(f).

The CZMA does not afford an administrative appeal process for the Office for Coastal Management's interpretation of its regulations of when the CZMA process starts for BWF's USACE application. In addition, the Office for Coastal Management's interpretation of its regulations in this situation is not subject to the limited CZMA administrative appeal process described at 15 CFR part 930, subpart H. See below for additional information regarding when the CZMA administrative appeal process may be invoked.

When NOAA completes a final agency action - such as issuing a decision on an administrative appeal pursuant to subpart H - that action is then subject to review in federal court pursuant to the Administrative Procedure Act.

On previous calls with you, Office for Coastal Management staff described the CZMA process, including ultimate resolution. In this situation, these steps would include the following.

1. The USACE determines that it has an active application that contains sufficient information for it to continue processing BWF's application. Notice to the states of the application contains sufficient information for the states to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable.

2. A state may then submit to the Office for Coastal Management, BWF, and the USACE a UAR request within 30 days of receipt of the notice.

If a state does not submit an UAR request or the Office for Coastal Management denies a state's request, then there is no CZMA review for the unlisted activity occurring outside the coastal zone(s).

As our office previously discussed with you, BWF could proactively and voluntarily submit a consistency certification and "avoid delay by simply seeking the State agency's expeditious concurrence rather than waiting for the Director's decision." 15 CFR § 930.54(f).

3. If the Office for Coastal Management approves a state's UAR request, then BWF would be required to submit a CZMA consistency certification to the relevant states. See 15 CFR §§ 930.54(e), and 930.57.

4. A state may concur, conditionally concur, or object to BWF's consistency certification. See 15 CFR §§ 930.62 and 930.63.

5. If a state objects, the USACE cannot authorize the activity, and BWF may file a CZMA Notice of Appeal with the NOAA Administrator within 30 days of receipt of a state objection. See 15 CFR part 930, subpart H.

6. If the NOAA Administrator overrides the state's objection, then the USACE may authorize the activity. If the NOAA Administrator sustains the state's objection, the USACE cannot authorize the activity. See 15 CFR § 930.130(e).

7. The NOAA Administrator's appeal decision is final federal agency action for CZMA purposes and can be challenged in federal district court under the Administrative Procedure Act. See 15 CFR § 930.130(c).

For all parties concerned, regarding possible future submission of state UAR requests and comments on UAR requests, because of the COVID-19 emergency you should not hard-mail anything to NOAA or the Office for Coastal Management as we have very limited access to our offices. Any UAR request letters or comments should be emailed to the Office for Coastal Management (and copied to the other parties) as PDF documents attached to the email and sent to jeff.payne@noaa.gov and copied to kerry.kehoe@noaa.gov and david.kaiser@noaa.gov.

Please contact me at david.kaiser@noaa.gov if you have any questions.

Sincerely,
David Kaiser
Senior Policy Analyst
Office for Coastal Management, NOAA

On Sun, Feb 21, 2021 at 1:36 PM Scott W. Flood <scott@bwfisheries.com> wrote:

Dear Mr. Kaiser,

Blue Water Fisheries, LLC (BWF) hereby submits the attached memorandum in support of its request that your Office reconsider, and reverse, its decision that the 30 day period for a state coastal management program to submit an unlimited activity review with your office does not commence to run until after a Federal agency deems an application complete. Further, for the reasons set forth in the memorandum, this action violates BWF's procedural due process protections as set forth in the 14th Amendment of the U.S. Constitution and is not consistent with the provisions of 15 C.F.R. 930.54 (a)(2). Lastly, BWF also submits that this decision is a bad policy for the Office of Coastal Management nationally.

Thank you for considering BWF's comments and reconsidering OCM's decision in this matter. Should OCM not reverse this decision, please advise me what appeal process is available to BWF.

Thank you for your consideration.

Scott

On Fri, Feb 12, 2021 at 5:49 PM David Kaiser - NOAA Federal <david.kaiser@noaa.gov> wrote:

Chris, et al,

Below is the Office for Coastal Management's response to your email on the Coastal Zone Management Act federal consistency 30-day time period for state unlisted activity review requests for the Blue Water Fisheries U.S. Army Corps of Engineers and U.S. Environmental Protection Agency permit applications.

Please let me know if you have any questions,
Thanks,
David

Thank you for your February 5, 2021, email regarding the Blue Water Fisheries, LLC proposed finfish aquaculture project in federal waters off Maine, New Hampshire, and Massachusetts, and Blue Water Fisheries' application to the U.S. Army Corps of Engineers (USACE) (USACE file number, NAE-2020-00155). In your email you describe some information that New Hampshire would need to determine reasonably foreseeable coastal effects and attach the USACE's February 5, 2021, letter to the applicant notifying Blue Water Fisheries that its application is incomplete and cannot be found complete until numerous pieces of information are provided to the USACE.

You then request the Office for Coastal Management's opinion on whether the application before the USACE is an "active application" under the National Oceanic and Atmospheric Administration's (NOAA's) Coastal Zone Management Act (CZMA) regulations (15 CFR § 930.51(f)) and whether the 30-day time period for a state to submit an unlisted activity review (UAR) request to the Office for Coastal Management under 15 CFR § 930.54 has started.

In an email and attachment dated February 7, 2021, sent by Blue Water Fisheries to the Office for Coastal Management, Blue Water Fisheries asserts that the USACE February 5, letter is irrelevant to the determination of when the 30-day UAR request time period begins and that Blue Water filed all relevant information with its applications. It is true, as Blue Water Fisheries asserts, that the Office for Coastal Management initially advised the states that the 30-day UAR request review period commenced on January 29, 2021. However, in light of the USACE February 5, letter, and for the reasons described below, the Office for Coastal Management no longer believes that is the case.

The USACE February 5, letter to Blue Water Fisheries states, in part,

We cannot process your application further until we have received this information. Please provide the requested information within 30 days from the date of this letter or we will administratively close your file. If your file is closed, we will reopen it and resume evaluating your application upon the receipt of the requested information.

Based on this USACE statement and the level of information the applicant needs to submit to the USACE, the Office for Coastal Management does not believe Blue Water Fisheries application is an "active application" for CZMA purposes and, therefore, a state would not have to submit an UAR request under 15 CFR § 930.54 to the Office for Coastal Management until the USACE determines that the application is complete.

In addition, even if the application were considered an active application under the CZMA, in its current form as described in the USACE February 5, letter, a state would not have to submit an UAR request until the specified additional information is provided. As described, in part, in NOAA's regulations, the 30-day UAR request time period for a state does not begin unless the notice provided to the state from the applicant "contain[s] sufficient information for the State agency to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable." 15 CFR § 930.54(a)(2). Based on the amount of needed information described in the USACE's February 5, letter, it does not appear possible, at this point, that a state could determine whether the project would result in reasonably foreseeable coastal effects. In addition, without the identified missing information it is not clear that the Office for Coastal Management would have sufficient information to determine coastal effects under 15 CFR § 930.54(c), were a state to submit a UAR request for this project.

Therefore, for both of these reasons, a state's 30-day UAR request time period will not begin until a state receives notice of the completed USACE application.

It is not clear whether there are similar information deficiencies in the applicant's application to the U.S. Environmental Protection Agency (EPA) for a Clean Water Act (CWA) discharge permit for the part of the facility that is in federal waters. However, unless EPA determines that Blue Water Fisheries' CWA permit application is not complete in a manner similar as the USACE found, then the states' 30-day UAR request time period for the EPA permit began on January 29, 2021, and ends on March 1, 2021.

Please contact me at david.kaiser@noaa.gov if you have any questions.

On Fri, Feb 5, 2021 at 4:05 PM David Kaiser - NOAA Federal <david.kaiser@noaa.gov> wrote:

Hi Chris,

Thanks for sending the Army Corps letter along and your email. Based on this information we expect to provide a response (hopefully next week) on whether the 30-day clock for a state to submit an unlisted activity review (UAR) request to the Office for Coastal Management under 15 CFR 930.54 has started or whether there is not yet an active application or sufficient information before the Army Corps for Coastal Zone Management Act UAR request purposes.

Please note I have also copied this email to the applicant, the National Marine Fisheries Service (Gloucester), and the Army Corps contact on the letter.

Thanks,
David

On Fri, Feb 5, 2021 at 2:57 PM Williams, Chris <CHRISTIAN.P.WILLIAMS@des.nh.gov> wrote:

Hello David,

As a follow-up to our conversation earlier today, I've attached the letter from the Army Corps of Engineers (ACOE) to Blue Water Fisheries, LLC (BWF) requesting additional information necessary to consider BWF's Section 10 application complete. As I mentioned, the ACOE has determined that BWF's application is incomplete, in part, because it does not address proposed land-based activities associated with the project, including the fish hatchery where fingerlings will be reared. The New Hampshire Coastal Program (NHCP) knows from conversations with Mr. Flood, CEO of BWF, that he intends to operate a fish hatchery in Hampton, NH and use shore-side facilities at Hampton Harbor to transfer fingerlings to the offshore pens and adult fish from the offshore pens to one or more processing facilities on shore. Without details of these land-based activities, the NHCP cannot determine whether they will have reasonably foreseeable effects on New Hampshire's coastal resources and/or uses.

Page 2 of the ACOE letter states "We cannot process your application further until we have received this information. Please provide the requested information within 30 days from the date of this letter or we will administratively close your file. If your file is closed, we will reopen it and resume evaluating your application upon the receipt of the requested information." Based on this information, we believe BWF's application is no longer under active review by the ACOE. Furthermore, active review of the application will not occur until the requested information is received by the ACOE. As such, the NHCP believes that the 30-day time period for it to request federal consistency review of the BWF proposal from NOAA-OCM, per the federal consistency regulations at §930.54, has not begun and will not begin until BWF provides the information requested by the ACOE in the attached letter.

The NHCP respectfully requests NOAA-OCM's opinion on this matter.

Thank you and please let me know if you have any questions.

Chris

Christian Williams | Program Coordinator

Coastal Program

Watershed Management Bureau

Water Division, NH Department of Environmental Services

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From: David Kaiser - NOAA Federal <david.kaiser@noaa.gov>

Sent: Tuesday, February 2, 2021 5:25 PM

To: Boeri, Robert (ENV) <robert.boeri@state.ma.us>

Cc: Williams, Chris <CHRISTIAN.P.WILLIAMS@des.nh.gov>; Kerry Kehoe <kerry.kehoe@noaa.gov>;
Todd Burrowes <todd.burrowes@maine.gov>

Subject: Re: FW: Blue Water Fisheries, LLC Finfish Aquaculture Farm

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The USACE is not like the BOEM situation we have discussed for BOEM's renewable energy program. For unlisted activities, other than BOEM, we assume an application is active for CZMA and unlisted activity purposes when the application is submitted to the federal agency. Even if an application is incomplete it can still be active. So you should assume the unlisted activity review (UAR) request 30-day period started on January 29. That would only change if the USACE determines that the application is not active/before the USACE. For example, if you submit an UAR request and during our review the USACE determines it is not an active application, you would withdraw your UAR request or OCM would issue a finding without prejudice that the UAR request cannot be made at this time and that the state can submit a new UAR request if or when the applicant resubmits an application to the USACE. Thanks, David

On Tue, Feb 2, 2021 at 4:10 PM Boeri, Robert (ENV) <robert.boeri@state.ma.us> wrote:

Hi David,

If the filing is considered to be incomplete by the USACE and additional information is requested, does the start date change to the date that the additional information is supplied or does it remain unchanged?

Thanks for your help,

Bob

Robert L. Boeri

Massachusetts Office of Coastal Zone Management - Project Review Coordinator/Dredging Coordinator - 251 Causeway Street, Suite 800, Boston MA 02114 - robert.boeri@mass.gov

From: David Kaiser - NOAA Federal <david.kaiser@noaa.gov>
Sent: Tuesday, February 2, 2021 2:01 PM
To: Williams, Chris
Cc: Kerry Kehoe; Todd Burrowes; Boeri, Robert (EEA)
Subject: Re: FW: Blue Water Fisheries, LLC Finfish Aquaculture Farm

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Todd had same questions. 11:05 pm is way after business hours so I think date of receipt would be 1/28 and Day one 1/29. Todd said he also got the applications and it looks like you did too. Assuming you got the email AND the applications then your 30-day clock started January 29.

Only about 10 inches of snow in Durham (but now it's sleeting - ugh).

Thanks, David

On Tue, Feb 2, 2021 at 1:33 PM Williams, Chris <CHRISTIAN.P.WILLIAMS@des.nh.gov> wrote:

Hi David,

I trust that like me, you spent part of your morning digging out from under ~15 inches of snow? At least it was pretty light and fluffy here in Exeter.

Per the email below, Blue Water Fisheries, LLC notified the New Hampshire Coastal Program (and Mass CZM and the Maine Coastal Program) that it had submitted an NPDES application to EPA and a 404 application to the Army Corps of Engineers for its proposed finfish aquaculture project in federal waters off NH and MA. Does the applicant's email constitute the official notice that begins the 30-day time period for the New Hampshire Coastal Program to request federal consistency review of the proposal from NOAA-OCM? If so, given that the email was sent on January 27th at 11:05pm, after normal business hours, does the 30-day clock start on January 28th?

Thanks.

Chris

Christian Williams | Program Coordinator

Coastal Program

Watershed Management Bureau

Water Division, NH Department of Environmental Services

222 International Drive, Suite 175

Portsmouth, NH 03801

Phone: 603-559-0025

Christian.Williams@des.nh.gov



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From: Scott W. Flood <scott@bwfisheries.com>

Sent: **Wednesday, January 27, 2021 11:05 PM**

To: Williams, Chris <CHRISTIAN.P.WILLIAMS@des.nh.gov>; Burrowes, Todd <todd.burrowes@maine.gov>; Robert Boeri <robert.boeri@mass.gov>

Cc: Kevin Madley <kevin.madley@noaa.gov>

Subject: Blue Water Fisheries, LLC Fish Farm

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Good evening Mr. Boeri, Mr. Burrowes and Mr. Williams,

Attached please find copies of Blue Water Fisheries, LLC's DPDES application, with the US EPA, and its application with the US Army Corps of Engineers for its offshore fish farm that will be located in waters of federal jurisdiction, I offer the following documents for your consideration:

1. EPA Form 3510-1
2. EPA Form 3510-2B
3. USACE Eng Form 4345
4. USACE Form Appendix B
5. Cover letter to USACE
6. Cover letter to US EPA

Copies of these documents are being mailed to you via the US Postal Service. Should you have any questions regarding these documents, please feel free to contact me by calling (603) 860-3111 or via email at scott@bwfisheries.com.

Best wishes,

Scott

[Redacted Signature]

Scott W. Flood, CEO

PO Box 159

Contoocook, NH 03229

(603) 860-3111

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David Kaiser, Senior Policy Analyst

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